

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILLIAM D. SMITH,
Plaintiff,

v.

DALE FETROE, ELIZABETH
SUITER, MARTY LYONS, and
MARY JO CURREY,
Defendants.

NO. CV-11-5093-CI

**ORDER ADOPTING REPORT AND
RECOMMENDATION**

Magistrate Judge Cynthia Imbrogno filed a Report and Recommendation on June 21, 2013, recommending that Defendants' Motion to Dismiss which the court, by Order entered on July 31, 2012, construed as a Motion for Summary Judgment, (ECF No. 38, 58) be granted and all claims against Defendants be dismissed with prejudice. (ECF No. 89). On July 10, 2013, Plaintiff filed untimely¹ objections to the Report and Recommendation and a motion for leave to amend complaint.² (ECF No. 90). Defendants filed a response to Plaintiff's objections and motion to amend complaint.

I. MOTION FOR LEAVE TO AMEND COMPLAINT

Attached to Mr. Smith's objections to the Magistrate Judge's report and recommendation is his request for leave to amend his

¹Plaintiff's objections were due on July 5, 2013.

²Plaintiff filed a motion to amend complaint as an exhibit, asserting a new claim under the Americans with Disabilities Act (ADA). ECF No. 90, at 60-62.

1 complaint, wherein he asserts that he would like to add an ADA
2 claim. Defendants argue that Mr. Smith's request is untimely,
3 prejudicial, and futile. The court finds Mr. Smith's request is
4 untimely and prejudicial because he has waited until after a
5 report and recommendation advising dismissal has been issued for
6 his complaint. Moreover, Mr. Smith was informed by the court in
7 April 2012 that his complaint did not contain an ADA claim (ECF
8 No. 36), but the information submitted by Mr. Smith shows he did
9 not file a grievance alleging an ADA violation until October 2012,
10 with a final decision denying his claim in February 2013. ECF No
11 90, at 52-55. Mr. Smith does not give any explanation for his
12 nearly six month delay in filing a grievance or his need to wait
13 over a year to request leave to amend his complaint. Finally, and
14 most importantly, Mr. Smith has not alleged facts to show that he
15 is allegedly a qualified individual with a disability. Assuming
16 *arguendo* that Mr. Smith was a qualified individual with a
17 disability, the record does not support the conclusion that he is
18 being denied medical services at CRCC. In fact, the evidence
19 clearly establishes that he is being provided medical services but
20 he is not satisfied with Defendants Fetroe and Suiter's medical
21 decisions.

22 New evidence submitted by Mr. Smith indicates he is receiving
23 medical care. The Level III grievance submitted by Mr. Smith
24 contains a detailed explanation of Mr. Smith's medical care
25 regarding medical tennis shoes. See ECF No. 90, at 53-54. In its
26 response to the grievance, the Department of Corrections informed
27 Mr. Smith why his medical tennis shoes were discontinued and
28 informed him that he would need a thorough examination of his feet

1 and an updated X-ray before his request could be sent to the Care
2 Review Committee. ECF No. 90, at 54. The Department then offered
3 him an X-ray that Mr. Smith promptly refused. ECF No. 90, at 54.
4 This information clearly shows Mr. Smith has access to medical
5 care at CRCC and his proposed ADA claim is frivolous. Therefore,
6 Mr. Smith's request for leave to amend his complaint to add an ADA
7 claim is futile and is hereby denied.

8 **II. OBJECTIONS TO THE R&R**

9 Mr. Smith asserts that the Magistrate Judge erred by failing
10 to consider all the evidence at summary judgment in a light most
11 favorable to him, including all reasonable inferences that could
12 be drawn from those facts. ECF No. 90, at 47. Specifically, Mr.
13 Smith contests the report and recommendation's reliance on the
14 Defendants' evidence submitted with their motion for dismissal and
15 supplemental motion for summary judgment. ECF No. 90, at 3-22,
16 32-47. Mr. Smith submits on numerous occasions that the evidence
17 submitted by the Defendants was misleading and unsupported by the
18 evidence he submitted on his behalf. ECF No. 90, at 2-47. Mr.
19 Smith, however, fails to cite anywhere in the record that calls
20 into doubt the material facts relied upon by the Magistrate Judge.
21 See ECF No. 90, at 2-47.

22 Plaintiff makes no factual or legal argument in his objection
23 to the Magistrate Judge's Report and Recommendation and instead
24 relies on his own self-serving declaration with accompanying
25 exhibits. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d
26 1054, 1061 (9th Cir. 2002) (self-serving testimony uncorroborated
27 by other evidence does not create a genuine issue of material
28 fact). Mr. Smith's conclusory claims that the Magistrate Judge

1 did not consider any of the evidence he presented in opposition to
2 summary judgment is unsubstantiated. The Report and Recommendation
3 references evidence Mr. Smith submitted and weighs all the
4 evidence against the Eighth Amendment legal standards pertaining
5 to deliberate indifference. See ECF No. 89, at 5-15.

6 The Magistrate Judge properly developed her material facts
7 based on the evidence submitted by the parties. ECF No. 89, at
8 5-9. The Magistrate Judge then correctly viewed the uncontroverted
9 facts in a light most favorable to Mr. Smith. ECF No. 89, at 8-14.
10 The Magistrate Judge correctly relied on undisputed facts in
11 determining Defendants Lyons and Currey did not personally
12 participate in his alleged violations and that he received
13 adequate medical care from Defendants Fetroe and Suiter. ECF No
14 89, at 8-9, 11-14. Mr. Smith must set forth specific facts
15 showing a causal connection between each Defendant's actions and
16 the harm allegedly suffered by Plaintiff. *Aldabe v. Aldabe*, 616
17 F.2d 1089, 1092, (9th Cir. 1980). Plaintiff's objections are
18 without merit.

19 The Court finds the Magistrate Judge's thorough analysis with
20 respect to the requirements needed for it to find deliberate
21 indifference under the Eighth Amendment are correct. ECF No. 89,
22 at 9-15. The undersigned agrees with Judge Imbrogno that the
23 evidence of record clearly shows that Mr. Smith cannot establish
24 the objective or subjective components of deliberate indifference.
25 ECF No. 89, at 10-15. The undisputed objective medical evidence
26 shows Defendants Fetroe and Suiter evaluated Mr. Smith for medical
27 tennis shoes and determined he did not meet the criteria under the
28 Offender Health Plan. See ECF No. 27, at 12-63; ECF No. 72, at

22-40; ECF No. 87-2; ECF No. 87-3; ECF No. 89, at 11-12. Although Mr. Smith disagrees with Defendants Fetroe and Suiter's medical decision, he fails to offer any credible objective medical evidence indicating their position was incorrect.

Having reviewed the June 21, 2013 Report and Recommendation (ECF No. 89) and Plaintiff's objections thereto (ECF No. 90), the June 21, 2013 Report and Recommendation (**ECF No. 89**) is **ADOPTED in its entirety**.

Based on the forgoing, **IT IS HEREBY ORDERED:**

1. Defendants' Motion for Summary Judgment, (**ECF No. 38**) is **GRANTED** and all claims against Defendants are **DISMISSED, with prejudice**.

2. Plaintiff's motion to amend complaint (**ECF No. 90**) is **DENIED** for the reasons discussed above.

IT IS SO ORDERED. The District Court Executive is directed to enter this order, forward copies to Plaintiff and counsel for Defendants, and **CLOSE the file**.

DATED this 23rd day of July, 2013.

s/Lonny R. Suko

LONNY R. SUKO
UNITED STATES DISTRICT JUDGE